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Hiap-Taih Welding & Construction Sdn Bhd v Boustead Pelita Tinjar Sdn Bhd (formerly known as Loagan Bunut Plantations Sdn Bhd)

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HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO 24–243 OF 2007-III
DAVID WONG J
27 MAY 2008

C

Arbitration — Award — Challenging arbitration award — Applicable law — Whether Arbitration Act 1952 or Arbitration Act 2005 — Interpretation of

D

Arbitration — Award — Challenging arbitration award — Time limit — Whether still within time limit prescribed under O 69 r 4 of the Rules of the High Court 1980 to challenge award

E

Arbitration — Award — Enforcement — Cause of action accrued in Sarawak — Whether High Court of Sabah and Sarawak has jurisdiction

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The plaintiff was a Sarawak based company and was appointed by the defendant via a written contract to carry out a construction of earth works for the Loagan Bunut Palm Oil Mill in Sarawak. However, dispute arose between the parties culminating in the determination of the contract by the plaintiff. An arbitrator was appointed to resolve the amount of work done by the

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plaintiff. The final award by the arbitrator was delivered on in Shah Alam, Selangor Darul Ehsan which adjudged that the defendant was to pay the plaintiff the sum of RM1,144,555 with interest. The plaintiff filed an application to register the arbitration award for purposes of enforcement, which was opposed by the defendant. The defendant sought the

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postponement of the application on the ground that the defendant had initiated a legal proceedings in the Kuala Lumpur High Court to set aside part of the award pursuant to s 37(1)(a)(iv) and (v) and s 37(3) of the Arbitration Act 2005 ('the 2005 Act'). Apart from seeking an adjournment of the hearing, the defendant also resisted the application on the grounds, inter

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alia, that the application should be made in the High Court of Malaya because the High Court of Sabah and Sarawak has no jurisdiction to deal with the application and that the application was defective and incurable as it should have been made pursuant to the 2005 Act and not the Arbitration Act 1952 ('the 1952 Act').

Held, allowing the plaintiff's application:

(1) The plaintiff's cause of action is the right to enforce the award. Thus, the locality of the issuance of the award was of no consequence as to where the cause of action arose. In the instant case, the subject matter of the dispute concerned a construction in Miri, Sarawak. Further, the facts upon which the arbitration proceedings were conducted occurred entirely in Sarawak and the bulk of the arbitration proceedings was conducted in Miri, Sarawak. Therefore in substance, the cause of action arose in Miri, Sarawak and hence the High Court of Sabah and Sarawak has the jurisdiction and was the appropriate forum to determine the application (see para 8).

(2) Section 51(2) of the 2005 Act provides that in respect of arbitral proceedings commenced before the coming into force of the 2005 Act, the law governing arbitral proceedings shall be the law which would have applied as if this Act had not been enacted. These words are clear and unambiguous to refer to the 1952 Act. To have the award enforced when arbitral proceedings commenced under the old Act under that very Act is certainly an accrued right. In interpreting the provision there is a presumption that the Legislature does not intend to limit or take away vested rights unless the language clearly pointed so. Where one interpretation would produce an unjust or an inconvenient result and another would not have those effects, there is a presumption in favour of the latter. Hence the 1952 Act is the applicable Act and the application was not adjourned (see paras 13–14); *Thyssen Stahlunion Gmbh v Steel Authority of India Ltd* AIR 1999 SC 3923 and *Putrajaya Holdings Sdn Bhd v Digital Green Sdn Bhd* [2008] 7 MLJ 757 followed.

(3) The defendant's application to set aside the award in the Kuala Lumpur High Court was made outside the prescribed period of six weeks provided for in O 69 r 4 of the Rules of the High Court 1980 which in effect makes the award final and binding. Once an arbitral award has been made and the time limit for challenging it had expired, the award become irrevocably final and binding and can therefore, be entered as a judgment and enforced (see para 19).

[Bahasa Malaysia summary

Plaintif merupakan syarikat yang beroperasi di Sarawak dan dilantik oleh defendan melalui kontrak bertulis untuk menjalankan kerja-kerja pembinaan tanah untuk Loagan Bunut Palm Oil Mill di Sarawak. Walau bagaimanapun, pertikaian timbul di antara pihak-pihak yang berakhir dengan pemutusan kontrak oleh plaintif. Seorang penimbang tara dilantik untuk menyelesaikan jumlah kerja yang dilakukan oleh plaintif. Award terakhir oleh penimbang tara tersebut diberikan di Shah Alam, Selangor Darul Ehsan yang

memutuskan bahawa defendan harus membayar kepada plaintif jumlah sebanyak RM1,144,555 dengan faedah. Plaintif memfailkan permohonan untuk mendaftarkan award penimbang tara untuk tujuan pelaksanaan, yang ditentang oleh defendan. Defendan memohon penangguhan permohonan tersebut atas alasan bahawa defendan telah memulakan prosiding undang-undang di Mahkamah Tinggi Kuala Lumpur untuk mengenepikan award berikutan s 37(1)(a)(iv) dan (v) dan s 37(3) Akta Timbangtara 2005 ('Akta 2005'). Selain daripada memohon penangguhan perbicaraan, defendan juga menentang permohonan tersebut atas alasan, antara lain, bahawa permohonan sepatutnya dibuat di Mahkamah Tinggi Malaya kerana Mahkamah Tinggi Sabah dan Sarawak tidak mempunyai bidang kuasa untuk mengendalikan permohonan tersebut dan permohonan tersebut adalah cacat dan tidak boleh diperbetulkan kerana ia sepatutnya dibuat di bawah Akta 2005 dan bukan Akta Timbangtara 1952 ('Akta 1952').

Diputuskan, membenarkan permohonan plaintif:

(1) Kausa tindakan plaintif ialah hak untuk melaksanakan award. Oleh itu, tempat pengeluaran award tidak penting untuk menentukan di mana kausa tindakan timbul. Di dalam kes ini, perkara pertikaian melibatkan pembinaan di Miri, Sarawak. Selanjutnya, fakta atas mana prosiding timbang tara dikendalikan berlaku secara keseluruhannya di Sarawak dan sebahagian besar prosiding timbang tara dikendalikan di Miri, Sarawak. Oleh itu, sebenarnya, kausa tindakan berbangkit di Miri, Sarawak dan maka Mahkamah Tinggi Sabah dan Sarawak mempunyai bidang kuasa dan merupakan forum yang sesuai untuk memutuskan permohonan tersebut (lihat perenggan 8).

(2) Seksyen 51(2) Akta 2005 memperuntukkan bahawa berkaitan dengan prosiding timbang tara yang dimulakan sebelum penguatkuasaan Akta 2005, undang-undang yang mentadbir prosiding timbang tara adalah undang-undang yang akan beraplikasi jika Akta ini tidak digubal. Untuk memastikan award dilaksanakan apabila prosiding timbang tara dimulakan di bawah Akta lama, di bawah Akta tersebut, ia adalah hak yang terakru. Dalam mentafsir peruntukan tersebut, terdapat anggapan bahawa Perundangan tidak berniat untuk menghadkan atau mengambil hak yang terletakhak kecuali bahasanya dengan jelas merujuk sedemikian. Di mana satu tafsiran akan memberikan keputusan yang tidak adil atau tidak sesuai dan satu lagi tidak mempunyai kesan sedemikian, terdapat anggapan yang memihak kepada yang kemudian. Maka Akta 1952 adalah Akta yang terpakai dan permohonan tidak ditangguhkan (lihat perenggan 13–14); *Thyssen Stahlunion Gmbh v Steel Authority of India Ltd* AIR 1999 SC 3923; *Putrajaya Holdings Sdn Bhd v Digital Green Sdn Bhd* [2008] 7 MLJ 757 diikut.

(3) Permohonan defendan untuk mengenepikan award di Mahkamah Tinggi Kuala Lumpur dibuat di luar tempoh enam minggu yang dinyatakan yang diperuntukkan di dalam A 69 r 4 Kaedah-Kaedah Mahkamah Tinggi 1980 yang kesannya menjadikan award tersebut muktamad dan mengikat. Sebaik sahaja award timbang tara dibuat dan masa untuk mencabarnya telah tamat, award tersebut menjadi muktamad secara yang tidak boleh ditarik balik dan mengikat dan oleh itu boleh dimasukkan sebagai penghakiman dan dilaksanakan (lihat perenggan 19).]

Notes

For a case on challenging arbitration award, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1313.

For cases on enforcement, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1316–1329.

Cases referred to

Bank Utama (M) Bhd v Perkapalan Dai Zhun Sdn Bhd [2003] 5 MLJ 40 (refd)

Cita Marine Sdn Bhd v Progressive Insurance Bhd & Ors [2001] 1 MLJ 81 (refd)

Dayasar Corp Sdn Bhd v CP Ng & Co Sdn Bhd [1990] 1 MLJ 191 (refd)

Distiller Co (Biochemicals) Ltd v Laura Anne Thompson [1971] AC 458 (folld)

Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12 (folld)

Middlemiss & Gould v Hartlepool Corp [1972] 1 WLR 1643 (refd)

Putrajaya Holdings Sdn Bhd v Digital Green Sdn Bhd [2008] 7 MLJ 757 (folld)

State Government of Sarawak v Chin Hwa Engineering Development Co [1995] 3 MLJ 237 (refd)

Thyssen Stahlunion Gmbh v Steel Authority of India Ltd AIR 1999 SC 3923 (folld)

Legislation referred to

Arbitration Act 1952 s 27
Arbitration Act 2005 ss 10, 37(1)(a)(iv), 37(1)(a)(v), 37(3), 51, 51(2)
Arbitration Act 1940 [India]
Arbitration Act 1950 [UK] s 26
Arbitration and Conciliation Act 1996 [India]
Companies Act 1965 s 218
Courts of Judicature Act 1964 s 23(1)
Rules of High Court 1980 O 69 r 4

Richard Poh (Poh & Co) for the plaintiff.
Derbe Tang (Chew Jugah Wan Ullok & Co) for the defendant.

David Wong J:

APPLICATION

[1] Before me is an application by the plaintiff to register the arbitration award delivered by Mr Khoo Choong Keow dated 23 May 2007 ('the award') pursuant to arbitration in respect of Contract No B/2000/05-12 for earthworks for Loagan Bunut Oil Palm Mill, pursuant to s 27 of the Arbitration Act 1952 ('the 1952 Act') for purposes of enforcement supported by an affidavit of plaintiff's counsel, Mr Richard Poh Sze Eng (Mr Poh).

[2] the defendant is resisting the application and has filed three affidavits of one Ahmad Azhar Shah to oppose it.

[3] Miss Derbe Tang (Miss Tang), counsel for the defendant, is now asking for the postponement of this application on the ground that the defendant had initiated legal proceedings vide Kuala Lumpur High Court Originating Summons No R1–24–61 of 2007 to set aside that part of the award that awards the sum of RM836,277 to the plaintiff ('the KL Proceedings') pursuant to s 37(1)(a)(iv) and (v) and s 37(3) of the Arbitration Act 2005 ('the 2005 Act'). Apart from asking for an adjournment of this hearing, the defendant is resisting this application on two grounds:

(1) that the application should be made in the High Court of Malaya because the High Court of Sabah and Sarawak has no jurisdiction to deal with the application; and

(2) that the application is defective and incurable as it should be made pursuant to the 2005 Act and not the 1952 Act.

BACKGROUND FACTS

[4] The plaintiff is a Sarawak based company and was appointed by the defendant (though a West Malaysian based company it has a place of business in Sarawak) via a written contract to carry out the construction of earth works for the Loagan Bunut Palm Oil Mill in Sarawak for a contract sum of RM3,830,000. Dispute arose between the parties culminating in the determination of the contract by the plaintiff on 17 October 2001. An arbitrator was appointed on 3 July 2002 to resolve the amount of work done by the plaintiff. The final award by the arbitrator was delivered on 23 May 2007 in Shah Alam, Selangor Darul Ehsan which adjudged that the defendant is to pay the plaintiff the sum of RM1,144,555 (award amount)

with interest at the rate of 4% per annum from 17 October 2001 to 23 May 2007 and thereafter interest at the rate of 8% per annum from 24 May 2007 till full payment.

ISSUES

(1) Whether this application should have been made in the High Court of Malaya as opposed to the High Court of Sabah and Sarawak?

[5] Miss Tang submitted that since the award was issued in Peninsular Malaysia, the plaintiff's present application should have been initiated in the High Court of Malaya. The ground for such a submission is that the award is the 'cause of action' which arose in the jurisdictional area of the High Court of Malaya and not the High Court of Sabah and Sarawak.

[6] As authority for her submission, she relied on s 23(1) of the Courts of Judicature Act 1964 which reads as follows:

> (1) Subject to the limitations contained in Article 18 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where —
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> (a) the cause of action arose or
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> (b) the defendant or one of several defendant resides or has his place of business, or
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> (c) the facts on which the proceedings are based exist or are alleged to have occurred or
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> (d) any land the ownership of which is disputed is situated within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

[7] I must now look at what the term 'cause of action' means. In *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12, Tun Salleh Abbas said:

> 'A cause of action' is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action. Lord Diplock in *Letang v Cooper* [1965] 1 QB 232 at p 242 defined 'a cause of action' to mean 'a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person'. In my view the factual situation spoken of by Lord Diplock must consist of a statement alleging that, first, the respondent/plaintiff has

A a right either at law or by statute and that, secondly, such right has been affected or prejudiced by the appellant/defendant's act.

B **[8]** Applying the above principle, the award itself does not give rise to a cause of action. The plaintiff's cause of action, in my view, is the right to enforce the award. Hence the locality of the issuance of the award is no consequence as to where the cause of action arose. In determining where that is I am guided by the principle set out in the Privy Council in *Distiller Co (Biochemicals) Ltd v Laura Anne Thompson* [1971] AC 458 which states as follows:

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> It is manifestly just and reasonable that a defendant should have to answer for his wrongdoing in the country where he did the wrong. It is at any rate not manifestly just or reasonable that the defendant should have to answer for his wrongdoing in any country in the world to which the plaintiff (or the plaintiff's mother in a case such as this) may have happened to go before the damage occurred. It is not the right approach to say that, because there was no complete tort until the damage occurred, therefore the cause of action arose wherever the damage happened to occur. *The right approach is, when the tort is complete, to look back over the series of events, constituting it and ask the question, where in substance did this cause of action arise?* Theory no (iii) is that the cause of action arose within the jurisdiction if the act on the part of the defendant, which gives the plaintiff his cause of complaint has occurred within the jurisdiction. That is the rule laid down in *Jackson v Spittal* [1870] LR 5 CP 542, which is an authoritative case, and the rule is inherently reasonable, as the defendant is called upon to answer for his wrong in the courts of the country where he did the wrong.

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F (Emphasis added.)

[9] Applying the principle set out in the just quoted case, I must now look at the series of events which gave rise to the cause of action. The first event must be the dispute between the plaintiff and the defendant, which arose from a contract of construction works in Miri, Sarawak. This dispute was resolved by an arbitration hearing where the arbitrator found in favor of the plaintiff which the defendant now refuses to honor. The subject matter of the dispute concerns a construction of palm oil mill in Miri, Sarawak for the use of the defendant for their business activity in the State of Sarawak. The facts upon which the arbitration proceeding were conducted occurred entirely in Sarawak. Lastly the bulk of the arbitration proceeding was conducted in the conference room, Somerset Hotel, Miri, Sarawak. Looking at the circumstances at hand I am of the view that in 'substance' the cause of action arose in Miri, Sarawak and hence this court has the jurisdiction to hear this application. Not only that, I am also of the view that this court is the appropriate forum to determine this application. My reasons for saying so are these:

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(1) The cause of action arose in Miri, Sarawak.

(2) The plaintiff's registered office and business is in Miri, Sarawak.

(3) The defendant has a place of business in Sarawak situated at Bukit Limau Sungai Lelak, Lot 991 King's Commercial Centre, Miri — Bintulu Road, despite having its registered address in Kuala Lumpur.

(4) The subject matter — the palm oil mill is situated in Miri, Sarawak.

(5) The arbitration was conducted mostly in Miri based on facts which occurred in Miri, Sarawak.

(6) The witnesses, except one, were based in Miri, Sarawak.

(See *Dayasar Corp Sdn Bhd v CP Ng & Co Sdn Bhd* [1990] 1 MLJ 191, *Cita Marine Sdn Bhd v Progressive Insurance Bhd & Ors* [2001] 1 MLJ 81 and *Bank Utama (M) Bhd v Perkapalan Dai Zhun Sdn Bhd* [2003] 5 MLJ 40)

(2) Whether this application should have been made pursuant to the Arbitration Act 2005 (2005 Act) or Arbitration Act 1952 (1952 Act)?

[10] This issue involves the interpretation of s 51 of the 2005 Act which reads as follows:

51. Repeal and savings

(1) The Arbitration Act 1952 [Act 93] and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 [Act 320] are repealed.

(2) Where the arbitral proceedings were commenced before the coming into operation of this Act, the law governing the arbitration agreement and the arbitral proceedings shall be the law which would have applied as if this Act had not been enacted.

(3) Nothing in this Act shall affect any proceedings relating to arbitration which have been commenced in any court before the coming into operation of this Act.

[11] And the relevant and undisputed facts are these:

(1) Arbitration proceedings commenced in 2002;

(2) Arbitration proceedings ended with closing submissions on 20 December 2005;

(3) Arbitration Act 2005 came into force on 15 March 2006;

(4) Final award was published on 23 May 2007;

(5) This application was filed in 23 July 2007.

[12] Miss Tang submitted that the words 'arbitral proceedings' in s 51 of the 2005 Act do not include court proceedings and since this application is one, it is defective and a nullity. No authority was cited to support this proposition.

[13] Mr Poh naturally submitted that the 1952 Act is the applicable Act and his reason is that s 51(2) of the 2005 Act provides that in respect of arbitral proceedings commenced before the coming into force of the 2005 Act, *the law governing arbitral proceedings shall be the law which would have applied as if this Act had not been enacted*. These words, in Mr Poh's view, are clear and unambiguous. He cites as authority the Indian case of *Thyssen Stahlunion Gmbh v Steel Authority of India Ltd* AIR 1999 SC 3923. In that case, the arbitral proceedings were commenced on 14 September 1995 under their 1940 Arbitration Act. On 25 January 1996, the new Indian Arbitration and Conciliation Act 1996 came into force. The *Arbitral Award* was published on 24 September 1997. An issue similar to ours was considered by the Indian Supreme Court which held that since the arbitral proceedings commenced before the 1996 Act came into force, the award would be enforced under the provisions of the Arbitration Act 1940. The rationale of Indian Supreme Court can be seen from this passage of the judgment:

> Section 85(2) is the saving clause. It exempts the old Act from complete obliteration so far as pending arbitration proceedings are concerned. That would include saving of whole of the old Act up till the time of the enforcement of the award. This section 85(2)(a) prevents accrued right under the old Act from being affected ... There is a presumption that the Legislature does not intend to limit or take away vested rights unless the language clearly points to the contract. It is correct that the new Act is a remedial statute and, therefore, section 85(2)(a) calls for strict construction, it being a repealing provision. But then as stated above where one interpretation would produce an unjust or an inconvenient result and another would not have those effects, there is then also a presumption in favour of the latter.
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> Enforcement of the award, therefore, has to be examined on the touchstone of the proceedings held under the old Act ... Principles enunciated in the judgments show as to when a right accrues to a party under the repealed Act. It is not necessary for the right to accrue that legal proceedings must be pending when the new Act comes into force. To have the award enforced when arbitral proceedings commenced under the old Act under that very Act is certainly an accrued right. Consequences for the parties against whom an award is given after arbitral proceedings have been held under the old Act though given after the coming into force of the new Act, would be quite grave if it is debarred from challenging the award under the provisions of the old Act. The structure of both the Acts is different ... We have been informed that numerous such matters are pending all over the country where the award in similar circumstances is sought to be enforced or set aside under the provisions of the old Act. We, therefore, cannot adopt a construction which would lead to such anomalous situations where the party seeking to have the award set aside finds himself without any remedy.

[14] A similar approach was taken in the recent case of *Putrajaya Holdings Sdn Bhd v Digital Green Sdn Bhd* [2008] 7 MLJ 757 by Ramly Ali J where the learned judge considered a similar issue to the one at hand. The facts there were these: the plaintiff and the defendant had entered into a building contract in 2002 which contained an arbitration clause. In July 2007 the defendant served a statutory notice under s 218 of the Companies Act 1965 on the plaintiff for the sum of RM383,689.10 being an alleged debt due under the building contract. To counter the notice, the plaintiff took out a writ action seeking a declaration that the statutory notice was wrong and premature as there was a bona fide dispute of the demanded sum and also a permanent injunction against the defendant from presenting a winding up petition to wind up the plaintiff. The defendant then filed a defence and counterclaim against the defendant. The plaintiff also filed an application for stay of the defendant's action under s 10 of the 2005 Act which reads as follows:

> 10 Arbitration agreement and substantive claim before court
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> (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds —
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> (a) that the agreement is null and void, inoperative or incapable of being performed; or
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> (b) that there is in fact no dispute between the parties with regard to the matters to be referred.

[15] The learned judge acknowledged that if the 2005 Act was the applicable Act he would have no choice but to stay the defendant's counterclaim. However in view of the fact that the building contract between the plaintiff and the defendant was entered into prior to the 2005 Act and the existence of cl 63.5 of the building contract (arbitration agreement), the learned judge rightly felt that he had to consider whether the 2005 Act or the 1952 Act was the applicable Act. This was how he approached the issue (at pp 185–186):

> The changes in the new 2005 Act are very substantial as it ousts the court's jurisdiction to interfere when the parties agree in writing to refer the dispute to arbitration and there is no similar provision to s 25(2) of the 1952 Act in the new 2005 Act. The defendant shall have not entered into the arbitration agreement with the plaintiff if the defendant were aware that it cannot refer the dispute to the court as provided under s 25(2) of the 1952 Act.

The court is of the view that it is the defendant's right and/or privilege pursuant to cl 63.5 of the said arbitration agreement to make a reference to the 1952 Act should any dispute arises between the defendant and the plaintiff under the building contract. And pursuant to the 1952 Act, in certain circumstances, such as the circumstances that appeared in this present case where the element of fraud is in issue, the defendant has the right and/or privilege not to refer the dispute to an arbitrator and instead institute legal proceedings in the High Court to determine the dispute between the plaintiff and the defendant. (see s 25(2) of the 1952 Act).

The repeal of the 1952 Act in whole shall not affect any right or privilege acquired or accrued under the 1952 Act or affect any legal proceedings in respect of any such right or privilege and any such legal proceedings may be instituted or continued as if the Arbitration Act 2005 had not been made.

In this respect s 30(1) of the Interpretation Act 1948 and 1967 provides: The repeal of a written law in whole or in part shall not:

(a) ...

(b) Affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law; or

(c) ...

(d) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been made.

Pursuant to cl 63.5 of the arbitration agreement reference of any dispute shall be deemed to be reference to arbitration within the meaning of the 1952 Act. Section 25(2) of the 1952 Act clearly envisages that when a dispute arises involving an element of fraud, the party in question has the right to refer the matter to the High Court straight away, without having to go through the process of arbitration first.

Therefore, since the right or privilege acquired by the defendant pursuant to the arbitration agreement to refer to the 1952 Act, and the right or privilege by the defendant pursuant to s 25(2) of the 1952 Act to refer the disputes to the High Court when the dispute involves the question of the perpetration of fraud on the part of the plaintiff, as clearly pleaded in the defendant's counterclaim dated September 14, 2007, any legal proceedings in respect of such right or privilege may be instituted or continued by the defendant as if the 2005 Act had not been made …

The 2005 Act is not meant to be applicable retrospectively. Section 51 of the 2005 Act is not an express provision to give a retrospective effect of the 2005 Act. There is no express provision in the 2005 Act to give that effect. the defendant, by virtue of clause 63.5 of the arbitration agreement and s 25(2) of the 1952 Act, does have an 'acquired, accrued or incurred' right to refer his

dispute to the High Court. The 2005 Act cannot be interpreted to take away such right from him unless there are clear provisions to that effect. There is no such provision in the 2005 Act.

[16] Having read both the two just quoted judgments with care, I have found no solid reason not to follow their rationale. The wordings in the Indian Act may be different to the 2005 Act but in substance they convey the same meaning.

[17] Accordingly I hold that the 1952 Act applies to this application.

(3) Should I adjourn this application because of the defendant's application to set aside the award in the Kuala Lumpur Court?

[18] In view of my finding of the two earlier issues, I see no reason why I should adjourn this application. I also do not understand why the defendant, after becoming aware of this application which was filed on 23 July 2007, did not see it fit to file their application to set aside the award in this court as no prejudice would be suffered by them.

(4) Should leave be given to the plaintiff to enforce the Award as provided for under s 27 of the 2002 Act?

[19] In view of my conclusion that the 1952 Act is the applicable Act, the defendant's application to set aside the award in the Kuala Lumpur High Court was made outside the prescribed period of six weeks provided for in O 69 r 4 of the Rules of High Court 1980 ('RHC') which in effect makes the award final and binding. In *Middlemiss & Gould v Hartlepool Corp* [1972] 1 WLR 1643, the English Court of Appeal held that once an arbitral award has been made and the time limit for challenging it has expired, the award become irrevocably final and binding and can therefore, be entered as a judgment and enforced under s 26 of the English Arbitration Act 1950 (equivalent with our s 27 of the 1952 Act). Does that mean that the defendant is estopped from resisting this application? It appears not as the Supreme Court in the case *State Government of Sarawak v Chin Hwa Engineering Development Co* [1995] 3 MLJ 237 at p 244 held that the defendant can wait until the plaintiff's application under s 27 of the 1952 Act to resist the enforcement of the award. This is what Edgar Joseph Jr SCJ said:

By way of amplification, it was argued that the judge had misdirected himself in holding, as he did in fact hold, that the employer was precluded from challenging the validity of the award for the first time, at the very late stage of enforcement proceedings under s 27 of the Act, when it was open for it to have done so at a much earlier stage, under s 24(2) of the Act or under O 69 r 2(3) of the Rules of

A the High Court, 1980. In support, our attention was directed to the following passage in *Commercial Arbitration by Mustill and Boyd* (2nd Ed), at p 546:

> A party who avails himself of a passive remedy does not himself take the initiative to attack the award, but simply waits until his opponent seeks to enforce the award by action or summary process, and then relies upon his matter of complaint as a ground why the court should refuse enforcement.

B It was implicit in the submissions of the Attorney-General that what he was contending for was a ruling by this court that the arbitration cl 43 — was not wide enough to confer jurisdiction upon the arbitrator to determine the questions:

C (1) whether the suspension of the contractor from future tendering, until further notice, was unlawful; and

(2) if so, what was the appropriate sum to award by way of damages for wrongful suspension.

D We agree, that in certain circumstances, a party may avail himself of a passive remedy by which is meant he does not take the initiative to attack an award, but simply waits until his opponent seeks to enforce the award by action or summary process, when he resists enforcement. *Mustill and Boyd on Commercial Arbitration* (2nd Ed) p 546 have instanced two situations when the passive E remedy would be available; namely:

(1) Where the award is so defective in form or substance that it is incapable of enforcement.

F (2) Where the whole or part of the award is ineffective on the ground that the relief granted lies outside the jurisdiction of the arbitrator.

[20] To recap, Miss Tang put forward three grounds why this court should not allow this application and they are:

G (1) the application should be adjourned pending the disposal of the Kuala Lumpur suit,

(2) the application should be made in the High Court of Malaya, and

H (3) the application is defective and incurable as it should be made pursuant to the 2005 Act and not the 1952 Act.

[21] I have earlier dealt with all these grounds and had found in favor for the plaintiff.

I CONCLUSION

[22] Be that as it may, I have gone through the KL proceedings and it would be unwise of me to brush it aside without the benefit of counsels'

submissions. That being the case, I direct counsels to submit to me whether the KL proceedings is within the two situations listed out by the learned authors in *Mustill and Boyd on Commercial Arbitration* (2nd Ed). Such submissions shall be filed, emailed and exchanged on or before 13 June 2008. Clarification of submission or judgment if possible shall be on 4 July 2008 at 9am.

Application allowed.

Reported by Augustine Soosay